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No. 81-1617

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND J. PLACE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits police from temporarily detaining personal luggage reasonably suspected of containing narcotics for the purpose of arranging its exposure to a trained narcotics detection dog.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 660 F.2d 44. The opinion of the district court (Pet. App. 34a-57a) is reported at 498 F. Supp. 1217.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a-31a) was entered on September 16, 1981. A petition for rehearing was denied on November 30, 1981 (Pet. App. 32a-33a). On January 20, 1982, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including February 28, 1982 (Pet. App. 58a). The petition

was filed on (Monday) March 1, 1982, and was granted on June 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT

Following the denial of his suppression motion, respondent pled guilty in the United States District Court for the Eastern District of New York to possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to three years' imprisonment. Finding that the temporary detention of respondent's suitcase in order to permit its exposure to a narcotics detection dog violated the Fourth Amendment, the court of appeals reversed.

1. a. The evidence adduced at the suppression hearing is set forth in the opinions of the courts below (Pet. App. 2a-6a, 34a-41a). It showed that on Friday morning, August 17, 1979, two Dade County, Florida, narcotics investigators, Detectives McGavock and Facchiano, on duty at the Miami International Airport, were observing passengers standing in line at the National Airlines ticket counter (*id.* at 34a). Their attention was attracted to respondent, who,

[1] Respondent entered the plea of guilty reserving the right to appeal the denial of the motion to suppress (Pet. App. 2a).

while standing in the ticket line, appeared to be nervously scanning the area and closely scrutinizing everyone entering or seated in the lobby (*id.* at 35a). In particular, respondent was observed staring at Detective McGavock as the officer conferred with Detective Facchiano and moved around the lobby area, although respondent would look away when Detective McGavock looked at him (*ibid.*).

After respondent purchased his ticket with cash and checked two suitcases, Detective Facchiano went to the baggage loading area to examine the identification on the luggage, while Detective McGavock followed respondent. He observed respondent walk toward the concourse gate for his flight and then suddenly return toward the ticket counter and walk a complete circle around the lobby area while continuously looking back over his shoulder (Pet. App. 35a-36a). Respondent then walked toward the concourse gate again, stopping for less than a minute in a restroom. In the meanwhile, Detective Facchiano rejoined Detective McGavock after ascertaining that the name on respondent's bags appeared to be "Place" (*id.* at 36a).

When respondent reached the security gate in the boarding area, Detective Facchiano approached him, displayed his credentials, and, after explaining that there was a serious contraband problem at the airport, asked respondent if he would show the officers some identification and his airline ticket. Respondent began to perspire heavily and handed the detective his ticket and driver's license, which identified him as Raymond Place. Detective Facchiano then asked respondent for consent to examine the contents of the suitcases respondent had checked. Respondent replied that he had no objection. Nevertheless, because re-

spondent's flight, bound for New York's LaGuardia Airport, was due to depart shortly, the officers decided not to search the luggage and terminated the discussion (see Tr. 28, 74).[2] As respondent proceeded to the security gate, he turned and remarked that he had recognized the detectives as police officers when he first saw them in the lobby (Pet. App. 36a-37a).

Detective McGavock then decided to go to the baggage loading area to examine respondent's luggage himself. He noticed that the identification labels on the two suitcases bore different street addresses in Hallandale, Florida. After copying down the addresses and obtaining from the airline the call-back telephone number that respondent had given with his reservation, Detective McGavock telephoned the Hallandale police department. They informed him that neither of the street numbers on respondent's suitcases existed and that the telephone number was for a residence at a different address on the same street as the addresses on the baggage tags. Detective McGavock then telephoned DEA Special Agent Gerard Whitmore in New York and informed him of what had transpired, giving him a description of respondent and his luggage (Pet. App. 37a-38a).

b. Agent Whitmore and his partner, Agent Iglesias, recognized respondent as he deplaned upon arrival at LaGuardia Airport. While walking to the baggage area, respondent repeatedly looked behind him, stopping once to look at the persons around him. At the baggage claim area, the agents observed respondent standing just outside the entrance looking at every person in the area. When the luggage arrived, respondent entered and picked up his bags. When Agent Whitmore began to follow respondent

[2] "Tr." refers to the transcript of the suppression hearing.

down a corridor, respondent abruptly stopped, turned, and stared at the agent (Pet. App. 38a-39a).

After respondent made a telephone call, apparently to a limousine service, the agents approached him, and Agent Whitmore identified himself to respondent as a federal narcotics agent. Respondent immediately remarked (Tr. 83): "I knew you guys were cops. I spotted [Agent Iglesias] as soon as I got out of the plane." The agent explained that, based partly on information relayed by the Dade County police, he suspected respondent of carrying narcotics. Respondent was asked whether the suitcases he was carrying were his. He replied that they were and added that a gang of police had surrounded him in the Miami Airport, humiliated him, and searched both his person and his luggage. Agent Whitmore then responded that he had been informed that respondent had not been searched at the Miami Airport, but respondent repeated his assertion that he had been searched. The agent then asked to see respondent's identification and requested permission to examine the contents of the suitcases, explaining that, in the absence of consent, the luggage could not be searched without a warrant (J.A. 5; Pet. App. 39a-40a).

Respondent declined to consent to a search and inquired whether he was under arrest or was free to leave the airport with his luggage. Agent Whitmore told respondent that he was not under arrest and was free to leave, but his luggage would be taken to a federal judge to make a determination as to whether a search warrant should issue. He also informed respondent that he could accompany the agents on the trip to the magistrate (J.A. 5-6). Respondent declined, however, explaining that he would be unable to do so because of "pressing en-

gagements" (J.A. 6). Agent Whitmore gave respondent a phone number where the agent could be reached at any time so that respondent could arrange for the return of his luggage (J.A. 9), and the agents loaded the luggage into a car and left the airport (Pet. App. 40a-41a).[3]

The agents then drove with the bags to a Customs Bureau dog handler facility at Kennedy Airport, leaving LaGuardia at about 4:10 p.m. and arriving at Kennedy approximately 35 minutes later (J.A. 11). Respondent's bags were placed among other parcels for exposure to a trained narcotics detecting dog and, at approximately 5:30 or 5:40 p.m., the dog signaled the presence of drugs in the smaller bag and reacted ambiguously toward the larger bag. Thereafter, a United States magistrate issued a search warrant for the smaller bag. Agent Whitmore then opened the bag and found 1,125 grams of cocaine, 25 LSD tablets, and a quantity of marijuana (Pet. App. 41a; J.A. 11-14).

2. Prior to trial respondent moved to suppress the evidence found in the smaller suitcase. The district court denied the motion, rejecting the claim that the temporary detention of the suitcase violated the Fourth Amendment. Relying heavily on *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980), the court held that reasonable suspicion that luggage contains contraband justifies a limited detention to obtain a dog sniff of the sort involved here (Pet. App. 52a-57a). Finding that the agents' observations of respondent's behavior during questioning "were suffi-

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[3] Before the agents left, respondent twice approached Agent Whitmore and inquired whether something could be "arrange[d]" or "fix[ed] up" so that he could leave the airport with his luggage (Pet. App. 40a; J.A. 7-8, 9).

cient to raise in the agents' mind a reasonable suspicion to believe that the bags contained narcotics,"[4] the court concluded that respondent's "Fourth Amendment rights were not violated by the detention of the bags by the DEA agents" (*id.* at 57a).[5]

3. A divided court of appeals reversed (Pet. App. 1a-29a). The majority assumed that the DEA agents' observations of respondent's behavior and the information they obtained from the Dade County detectives justified a reasonable suspicion that he was a drug courier,[6] but it concluded that "the prolonged seizure of [respondent's] baggage went far beyond

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[4] The district court noted that, in its view, the facts known to or observed by the agents were sufficient to constitute probable cause (Pet. App. 57a n.7).

[5] The court also rejected respondent's arguments that his Fourth Amendment rights were violated by the approaches made to him by the police in both Miami and New York. It held that both encounters were supported by reasonable suspicion that respondent was engaged in unlawful activity and gave a detailed enumeration of the factors that warranted the suspicion in each instance (Pet. App. 47a-52a). The court also rejected respondent's claim that the dog sniff was arranged so as to draw attention to his suitcases and hence was unreliable (*id.* at 57a).

[6] The court of appeals rejected the district court's view that the detention of respondent's luggage was supported by probable cause (Pet. App. 11a-12a). While we do not acquiesce in the correctness of that conclusion, especially in light of respondent's apparent bribe attempt (see note 3, *supra*) and his retreat from his earlier assertion of ownership of the smaller bag (see J.A. 8), we assume for purposes of this brief that the bags were detained on the basis of reasonable suspicion falling short of probable cause. Respondent challenged in a cross-petition the court of appeals' assumption that there was reasonable suspicion here, but that cross-petition was denied. No. 81-1835 (June 7, 1982).

a mere investigative stop and amounted to a violation of his Fourth Amendment rights" (*id.* at 14a).

The court of appeals first examined decisions of this Court concerning investigatory detentions of persons based on *Terry* v. *Ohio*, 392 U.S. 1 (1968). Relying on *Dunaway* v. *New York*, 442 U.S. 200, 212-213 (1979), and *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880 (1975), the court observed that an investigative stop of a suspect "has been upheld only where it lasted for only a few minutes or less and was limited to the locale in which the suspect was found" (Pet. App. 14a). The court then rejected the notion that the standard of reasonableness applicable to the detention of baggage could differ from that applicable to the detention of a person, stating (*id.* at 16a):

> [T]he Fourth Amendment does not draw any distinction between an unlawful seizure of a person and the similar seizure of his property. In both cases there is an infringement of the person's freedom of action. Police custody of his person precludes him from freely moving about. Police custody of his baggage deprives him of the use of it and its contents. Both create uncertainty and anxiety on his part.

Proceeding from this premise, the court concluded that, because a detention of respondent's person for the length of time involved here and his removal to a different location for the purpose of determining whether he was carrying narcotics would have violated the Fourth Amendment in the absence of probable cause (*ibid.*), the detention of his luggage in order to bring it to a drug detection dog "cannot reasonably be characterized as a *Terry*-type 'investigative stop'" (*id.* at 18a). Rather, the action "amounted to a seizure without probable cause of

[respondent's] effects in violation of his Fourth Amendment rights" (*ibid.*).[7]

The court further stated that *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), which involved the detention by postal officials for further investigation of mail packages suspected of containing contraband, was of no relevance to this case because the detention in *Van Leeuwen* occurred only after the owner of the parcels had voluntarily deposited them with the Postal Service. The court of appeals concluded that *Van Leeuwen* involved "at most a minimal or technical interference" with an individual's rights as opposed to the "substantial intrusion" involved here (Pet. App. 20a). Accordingly, the court found "unpersuasive" three decisions in other circuits upholding the constitutionality of similar temporary baggage detentions for the purpose of performing a dog sniff test (*id.* at 20a-21a).[8]

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[7] The court also opined that the Fourth Amendment violation was exacerbated by the agents' statement that they were taking the bags to a federal judge to get a search warrant, when they in fact first took them to another airport for exposure to a drug detection dog. Moreover, because the agents did not specify when the luggage would be returned, the court suggested that respondent could have understood that it would not be returned to him for "weeks." The court characterized this lack of disclosure as "not unlike the use of Writs of Assistance which led to the adoption of the Fourth Amendment" (Pet. App. 18a-19a).

[8] The court also asserted that those cases were factually distinguishable because it did not appear in them (1) that the duration of the detention was as long as it was here; (2) that the baggage was removed from the airport to another location; (3) that the agents concealed their plans for investigation of the baggage; and (4) that the agents indicated that the baggage detention would be of indefinite duration (Pet. App. 21a).

Judge Oakes filed a concurring opinion (Pet. App. 22a-23a) in which he asserted his view that seizures based on less than probable cause should be permissible only when made pursuant to "reasonable rules or regulations adopted by the appropriate governmental authority and subjected to appropriate judicial review" (*id.* at 22a).

Judge Kaufman dissented (Pet. App. 23a-29a), concluding that "the temporary detention of [respondent's] luggage was a reasonable 'stop' within the meaning of *Terry*" (*id.* at 28a). He explained that the Fourth Amendment's prohibition against "unreasonable" searches and seizures requires that "the government interest in deterring criminal conduct must be balanced against the individual's constitutionally protected privacy" (*id.* at 24a). Here, the "public interest in holding [respondent's] suitcase for a 'sniff test' was compelling—detection of an individual who trafficks in drugs" (*id.* at 24a-25a), and the agents' observations "reveal[ed] such a strong suspicion of illegal activity that the agents would have been remiss in their duty had they not detained [respondent's] bags" (*id.* at 24a-25a). Judge Kaufman emphasized the limited nature of the intrusion in that respondent himself was not detained, nor did the agents invade his privacy interest in the contents of his suitcases prior to securing a warrant (*id.* at 25a-27a). He also stated his view that the principles of *Van Leeuwen* were fully applicable here and that, contrary to the majority's assertion, the baggage detention cases in other circuits were not distinguishable (*id.* at 27a-28a & n.2).

SUMMARY OF ARGUMENT

A. The "reasonableness" of a search or seizure for Fourth Amendment purposes is judged by balancing the magnitude of the intrusion on the individual's Fourth Amendment interest against the government interest served thereby. See, *e.g.*, *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979). While probable cause has been adopted as the normal benchmark for evaluating the reasonableness of searches, there are circumstances involving a lesser privacy intrusion or a reduced privacy expectation in which a search may be conducted on less than probable cause. Similarly, the concept of a "seizure" encompasses a broad spectrum of police actions, some of which involve only a modest intrusion into an individual's liberty and hence may be effected on the basis of suspicion that does not amount to probable cause. In the case of seizures of the person, some seizures need be based only on a reasonable suspicion of criminal activity in order to be "reasonable." Other seizures, however—arrests and their functional equivalents—are of such duration and severity that they are unreasonable in the absence of probable cause. Thus, there is a large class of seizures or temporary detentions, including those of more than momentary duration but not tantamount to an arrest, that may be effected on the basis of reasonable suspicion if justified by a strong government interest in investigating criminal activity. See generally *Michigan* v. *Summers*, 452 U.S. 692 (1981); *Terry* v. *Ohio*, 392 U.S. 1 (1968).

B. The concept of an investigative detention on the basis of reasonable suspicion also applies to detentions of personal effects. Moreover, such a detention may be of longer duration than a detention of the person because it entails a significantly lesser intrusion into personal liberty. For example, in

United States v. *Van Leeuwen*, 397 U.S. 249 (1970), the Court approved the detention on the basis of reasonable suspicion of two packages sent through the mail, because the detention was necessary for the pursuit of a specific line of inquiry. The Court explained that such a detention was reasonable because the significant Fourth Amendment interest involved—the privacy of the mail—was not disturbed.

The court of appeals' holding that the luggage detention here was unreasonable in the absence of probable cause rests on two faulty premises. First, the court asserted (Pet. App. 6a-7a) that "[w]ith rare exceptions" a seizure requires both probable cause and a warrant. This assertion is flatly wrong as to the warrant requirement. See, *e.g.*, *Payton* v. *New York*, 445 U.S. 573, 587 (1980). And as to the suggestion that probable cause is a standard prerequisite to seizures generally, the court ignores the teaching of *Van Leeuwen*, *Terry*, and other cases that a seizure, particularly one limited to an individual's effects, is not an invasion of privacy like a search and hence does not interfere with an individual's Fourth Amendment interests to the same extent.

More important, the fundamental basis for the court's holding—that "the Fourth Amendment does not draw any distinction between an unlawful seizure of a person and the similar seizure of his property" (Pet. App. 16a)—is manifestly erroneous unless the reasonableness standard is to be read out of the Amendment. Plainly, the detention of baggage is significantly less intrusive than the detention of a person. A person who is detained is effectively prevented from going about his normal business. By contrast, a temporary detention of baggage or other property has no similar consequences; while it is theoretically some intrusion onto the individual's liberty that is

protected by the Fourth Amendment, the detention is, as a practical matter, no more than an inconvenience.

Because the Fourth Amendment determination of the "reasonableness" of a government action depends upon a balancing of the relative magnitudes of the intrusion and the government interest involved, the fact that a baggage detention is significantly less intrusive than a detention of a person must be a critical factor in the determination whether a particular baggage detention is reasonable when effected on the basis of a reasonable suspicion of criminal activity. There is of course a point at which further prolongation of any seizure will become unreasonable in the absence of probable cause. But, because of the relative modesty of the intrusion, reason dictates that a temporary detention of luggage may continue for a longer period on the basis of reasonable suspicion than could a detention of a person under similar circumstances.

C. In this case, a proper balancing of the strong government interest implicated when law enforcement officials reasonably suspect luggage to contain contraband and the interests of suspected drug couriers inconvenienced by a temporary detention of that luggage for a dog sniff test compels the conclusion that such a detention is reasonable. The government has a compelling interest in controlling the flow of narcotics. To further this goal, the government has established an airport surveillance program designed to detect domestic drug couriers, pursuant to which government agents observe selected flights and approach and question suspected drug couriers. In some cases, like respondent's, the brief questioning neither allays the agents' suspicions nor results in sufficient additional information to give rise to probable cause to arrest. In these circumstances, the

fact that it might be unreasonable to detain the individual himself any longer does not necessarily mean that investigating officers must allow him to place the narcotics he is reasonably suspected of transporting into the stream of distribution, when detention of the luggage for the purpose of arranging a dog sniff test will enable the officers to confirm or dispel their suspicions. This detention is of only the limited duration necessary to undertake a specific course of investigation, and the government has a strong interest in being able to maintain the status quo long enough to complete that inquiry because, given the extreme reliability of the sniff test, it is almost certain to confirm or dispel the agents' suspicions.

The countervailing intrusion here was modest. Respondent was allowed to leave, and his luggage was immediately taken to the dog handling facility for the test; the duration of the entire process until probable cause was established was no more than 90 minutes. No privacy interest of respondent's in the contents of the luggage was invaded at all, either by the detention or by the sniff test (which reveals no information other than the presence or absence of narcotics). Thus, the detention involved at most a slight inconvenience to the respondent—the minimum possible under the circumstances unless the agents had allowed him to proceed with his luggage, enabling him to dispose of any contraband it might contain. As five other courts of appeals have held in this context, it would be extremely imprudent for agents to ignore their reasonable suspicions and allow a suspected drug courier to continue on his way with his luggage. Rather, given the substantial law enforcement interest implicated by the agents' reasonable suspicion and the limited intrusion involved in arranging the dog sniff test, it was "reasonable" within the mean-

ing of the Fourth Amendment for the agents to detain respondent's luggage for the limited time necessary to complete their investigation.

ARGUMENT

THE TEMPORARY DETENTION OF RESPONDENT'S LUGGAGE FOR FURTHER INVESTIGATION BASED ON A REASONABLE SUSPICION THAT IT CONTAINED NARCOTICS DID NOT VIOLATE THE FOURTH AMENDMENT

A. Seizures Of Limited Duration May Be Effected On The Basis Of Reasonable Suspicion

The substantive command of the Fourth Amendment prohibits "unreasonable searches and seizures" but does not further define the term "unreasonable." By its terms, then, the Fourth Amendment does not require that searches or seizures be based on probable cause. Rather, the decision whether a given type of search or seizure requires probable cause depends on whether it would be reasonable to permit the action on the basis of a lesser justification. And in analyzing a particular search or seizure to determine whether this "key principle" of reasonableness has been satisfied, the courts must engage in a "balancing of competing interests." *Michigan* v. *Summers*, 452 U.S. 692, 700 n.12 (1981), quoting *Dunaway* v. *New York*, 442 U.S. 200, 219 (1979) (White, J., concurring). Specifically, the reasonableness of an action is judged "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979) (footnote omitted). See also *Brown* v. *Texas*, 443 U.S. 47, 50-51 (1979); *United States* v. *Martinez-Fuerte*, 428 U.S.

543, 555 (1976); *Camara* v. *Municipal Court*, 387 U.S. 523, 536-537 (1967). This balancing is not made entirely on an *ad hoc* basis; the Court has established certain basic principles that guide the reasonableness determination.

Some types of searches and seizures are *per se* unreasonable in the absence of probable cause. For example, the search of a person's home, which is a most substantial intrusion on his privacy, cannot be conducted except on the basis of probable cause. See, *e.g.*, *Payton* v. *New York*, 445 U.S. 573, 583-590 (1980). There are, however, other circumstances in which a search may be conducted in the absence of probable cause to believe that evidence of criminal activity will be found—either because the search intrudes into an area where there is a significantly reduced privacy expectation or because of the strong government interest that necessitates the search. See *New York* v. *Belton*, 453 U.S. 454 (1981) (search incident to arrest); *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 320-321 (1978) (administrative search); *United States* v. *Ramsey*, 431 U.S. 606 (1977) (border search); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976) (inventory search of automobile); *Cady* v. *Dombrowski*, 413 U.S. 433, 448 (1973) (search to protect safety of public); *Terry* v. *Ohio*, 392 U.S. 1, 24-27 (1968) (limited weapons search); see also Brief for the United States as Amicus Curiae at 17-22 in *Florida* v. *Brady*, No. 81-1636, 1982 Term (search of an open field).[9]

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[9] There are also areas of reduced privacy expectation, such as automobiles, where searches normally must be based upon probable cause, but the prophylactic measure of a warrant is not required. See, *e.g.*, *United States* v. *Ross*, No. 80-2209 (June 1, 1982).

Similarly, it is well established that seizures, which do not involve the privacy intrusion that is occasioned by a search, may sometimes be effected on less than probable cause. In general, two different substantive standards of suspicion are relevant in determining the reasonableness of seizures. Some police actions, even though they do constitute a seizure of the person (*i.e.*, a forcible restraint of the individual's freedom of movement), are sufficiently modest intrusions that they are "reasonable" when supported simply by a reasonable suspicion of criminal activity. See, *e.g.*, *United States* v. *Mendenhall*, 446 U.S. 544 (1980); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry* v. *Ohio*, *supra*; cf. *United States* v. *Martinez-Fuerte*, *supra*. On the other hand, some seizures are of such duration and severity that they may be undertaken only if probable cause exists to believe that the individual seized has committed a crime. The classic example of this latter type of seizure is a formal arrest, but the label attached by the police is not the dispositive factor. See *Dunaway* v. *New York*, *supra*. Rather, "the general rule [is] that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." *Michigan* v. *Summers*, *supra*, 452 U.S. at 700.

Thus, there is a significant class of detentions that, while constituting a Fourth Amendment "seizure," do not have the essential attributes of a formal arrest and hence are not so intrusive as to require probable cause. This Court's decisions establish some guidelines to be used in assessing whether a particular detention falls within this category. One such detention is the "stop-and-frisk" recognized in *Terry* v. *Ohio*, *supra*, where the Court held that reasonable suspicion that criminal activity was afoot provided a basis for a police officer briefly to detain a suspect

and search him for weapons. As the Court later explained in approving a similar detention in *Adams* v. *Williams*, 407 U.S. 143, 145 (1972), "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." Rather, "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.* at 146.

The authority to detain on reasonable suspicion is not limited to situations where the suspect is believed to be armed and dangerous. In *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 881-882, the Court recognized that law enforcement officers validly could stop a car reasonably suspected of containing illegal aliens and briefly question the occupants concerning their immigration status and the circumstances that aroused the officers' suspicion. See also *United States* v. *Cortez*, 449 U.S. 411 (1981); *United States* v. *Mendenhall*, *supra*, 446 U.S. at 552 (opinion of Stewart, J.), 560-566 (opinion of Powell, J.).

Moreover, an investigative detention based on reasonable suspicion may satisfy the "reasonableness" standard of the Fourth Amendment even if it is of more than momentary duration. This Court has noted that its precedents demonstrate that the rule permitting "limited intrusions" on the basis of reasonable suspicion "is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry* and *Adams*." *Michigan* v. *Summers*, *supra*, 452 U.S. at 700. On the contrary, "[i]f the purpose underlying a *Terry* stop—investi-

gating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams*." *Id.* at 700 n.12. In this connection, the Court quoted approvingly Professor LaFave's recitation of investigative techniques that could properly be conducted by police on the basis of reasonable suspicion, including detaining the suspect "while it is determined if in fact an offense has occurred in the area, a process which might involve checking certain premises, locating and examining objects abandoned by the suspect, or talking with other people." *Id.* at 700-701 n.12, quoting 3 W. LaFave, *Search and Seizure* § 9.2, at 36-37 (1978). This power to detain on reasonable suspicion is of course not limitless, and it is clear that an investigative detention may become unreasonable if it is unduly prolonged. *Ibid.*; see also *Dunaway* v. *New York*, *supra*.

In sum, the court of appeals was doubly mistaken in the opening premise of its analysis (Pet. App. 6a-7a), that "[w]ith rare exceptions the seizure of a person or his effects is deemed *per se* 'unreasonable' unless a warrant has first been obtained from a neutral magistrate upon a showing of probable cause. *Katz* v. *United States*, 389 U.S. 347, 357 (1967)." The court's miscitation of *Katz* is illuminating; while there may have been a technical sense in which the conversations in *Katz* could be said to have been "seized," it is perfectly plain that the Court's concern was with the search (*i.e.*, the invasion of privacy involved in the overhearing). Indeed, far from there being a general principle that a warrant is required for a seizure, the rule is precisely the opposite. No warrant is required either for the arrest of an individual (*United States* v. *Watson*, 423 U.S. 411

(1976)) or for the seizure of property (*Payton* v. *New York*, *supra*, 445 U.S. at 587; *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977)).[10]

If the court of appeals had been correct in the assertion that seizures generally require warrants, there might be more force to its conclusion that probable cause is also a prerequisite, since the Warrant Clause of the Fourth Amendment does specifically require probable cause as a precondition to a warrant. Its premise is not correct, however, and its conclusion regarding the general necessity for probable cause is thus analytically flawed, in addition to being contrary to the well-established line of decisions of this Court discussed above that hold that probable cause is not uniformly required for reasonable seizures.

B. A Temporary Detention For Further Investigation Of Luggage Suspected Of Containing Contraband Is A Limited Intrusion That May Be Effected On the Basis Of Reasonable Suspicion Even Though A Similar Detention Of The Person Might Require Probable Cause

The concept of an investigative detention is not limited to the seizure of persons—indeed, it would be utterly irrational so to limit it. In *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), the Court recognized that the Fourth Amendment permits the temporary detention of effects for further investigation when police reasonably believe that those effects contain contraband. In *Van Leeuwen*, two packages sent through the United States mails aroused the sus-

[10] While both *Payton* and *Steagald* v. *United States*, 451 U.S. 204 (1981), require some kind of warrant as a precondition to an arrest entry into private premises, it is evident from the analysis in those decisions that it is not the arrest itself (the "seizure") but rather the search of the premises for the suspect that triggers the warrant requirement.

picion of postal officials. The postal officials detained the packages for about a day while certain lines of inquiry were pursued. The information obtained during this period was used to obtain a search warrant, and contraband was discovered in the packages.

A unanimous Court held that the detention did not violate the Fourth Amendment. The Court recognized that the case presented a *Terry*-type question and acknowledged that "detention of mail could at some point become an unreasonable seizure of 'papers' or 'effects' within the meaning of the Fourth Amendment." 397 U.S. at 252. The Court found, however, that the particular intrusion involved in *Van Leeuwen* did not rise to that level. The Court emphasized that "[t]he significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained" (*id.* at 253). The Court concluded that "[d]etention for this limited time was, indeed, the prudent act" and not " 'unreasonable' within the meaning of the Fourth Amendment" (*ibid.*).[11]

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[11] It is possible to analyze the postal officials' actions in *Van Leeuwen* as not involving a Fourth Amendment "seizure" at all, on the ground that the packages had been voluntarily delivered into the hands of the Postal Service. On the other hand, the bailment of the packages was for the purpose of having them transported to the addressees, and it is equally possible to conclude that a seizure did occur as soon as they were diverted from the normal stream of mail transportation and retained for criminal investigative purposes. It is plain from the Court's opinion that it was of the view that the diversion of mail from normal handling would at some point become a seizure even though the initial governmental custody was with consent.

While the court of appeals correctly noted that *Van Leeuwen* is distinguishable on its facts from the instant case (Pet. App. 20a), the court's failure to give adequate consideration to the analysis in *Van Leeuwen* led it to conclude erroneously that a baggage detention of more than momentary duration necessarily is a substantial intrusion requiring probable cause. First, the court's premise that, with rare exceptions, a seizure of a person or his effects is per se unreasonable in the absence of probable cause (Pet. App. 7a) is clearly mistaken. As explained above (pages 17-19, *supra*), there is a large class of seizures of the person that are not as intrusive as an arrest and that are reasonable in the absence of probable cause. This is because seizures do not involve the exposure of an individual's private effects to the police, and thus a seizure of brief duration ordinarily is not as severe an intrusion into interests safeguarded by the Fourth Amendment as a search. See, *e.g.*, *United States* v. *Chadwick*, 433 U.S. 1, 13-14 n.8 (1977); *United States* v. *Lisk*, 522 F.2d 228, 230 (7th Cir. 1975) (Stevens, J.), cert. denied, 423 U.S. 1078 (1976) ("There is a difference between a search and a seizure. A search involves an invasion of privacy; a seizure is a taking of property"); cf. *United States* v. *Salvucci*, 448 U.S. 83, 91-92 (1980) (possessory interest not sufficient to confer legitimate expectation of privacy). Because the principal Fourth Amendment interest in a bag or package is in the privacy of its contents, this distinction between searches and seizures is particularly marked in the area of seizures of effects. See *Van Leeuwen*, 397 U.S. at 253.

More important, the fundamental basis for the court of appeals' holding—that "the Fourth Amendment does not draw any distinction between an unlawful seizure of a person and the similar seizure of

his property" (Pet. App. 16a)—is manifestly erroneous. One need only imagine oneself in the position of a suspect to recognize instantly that the detention of baggage is significantly less intrusive than the detention of a person. When a person is detained, his freedom of movement is restrained, and he is effectively prevented from going about his normal business for the period of the detention. By contrast, the temporary detention of an individual's luggage is not an " 'intrusion upon the sanctity of the person.' " *Dunaway* v. *New York*, *supra*, 442 U.S. at 209, quoting *Terry* v. *Ohio*, *supra*, 392 U.S. at 17. The detention does not significantly interfere with the individual's activities, for he is free to proceed wherever he chooses and do whatever he wants. To be sure, the fact that a person has been temporarily dispossessed of his luggage is some intrusion on his autonomy and may give rise to a concern over the safety of his belongings that would not exist if he could retain the luggage in his possession.[12] In some cases, there may be some practical inconvenience to the individual as well, if he wants access during the period of detention to some item con-

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[12] In the particular context involved here, where the respondent had just retrieved his luggage after checking it with the airline, it is apparent that this interest in not relinquishing custody of the luggage was somewhat diminished (except insofar as his commission of a crime gave him a special interest in avoiding police custody of his luggage, a consideration that deserves no weight in the Fourth Amendment calculus). If respondent was willing to entrust his effects to the custody of airline officials, he should not be any more concerned about their safety while in the custody of law enforcement officials. Of course, whether or not he has any legitimate concern over the security of his effects, it is still some intrusion on his individual liberty to detain his luggage without his consent.

tained in the luggage.[13] But it is clear that this limited intrusion involved a luggage detention, even if it is somewhat greater than the detention of the mail in *Van Leeuwen*, is significantly less of an interference with interests protected by the Fourth Amendment than a detention of the person would be.

Because the Fourth Amendment determination of reasonableness depends on a balancing of the extent of the intrusion occasioned by the police action against the magnitude of the government interest involved (see page 15, *supra*), it is clear that consideration of the degree of the intrusion is a critical element in determining whether a particular police action requires probable cause or, alternatively, is reasonable if effected on the basis of reasonable suspicion. Therefore, the court of appeals' holding that temporary detentions of luggage must be treated for Fourth Amendment purposes exactly the same as detentions of persons is completely unsupportable.[14] Rather, the

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[13] The court of appeals stated that a baggage detention will sometimes be "catastrophic" because the baggage may contain medicine essential for the treatment of a heart condition (Pet. App. 17a). Checked luggage seems a peculiar place to put essential medications. In any event, we agree that when an individual needs access to some contents of seized luggage, it would be an unreasonably severe intrusion, and therefore violative of the Fourth Amendment, for the police to refuse access to the luggage for the purpose of removing the necessary items. Cf. *United States* v. *Benjamin*, 637 F.2d 1297, 1299 (7th Cir. 1981) (suspect permitted to remove certain personal effects from detained briefcase). Given the fact that an individual will ordinarily be permitted to remove necessities from his luggage, a luggage detention almost invariably will involve only a minor inconvenience to the owner, contrary to the court of appeals' suggestion that anyone but a "healthy vagrant" would be seriously inconvenienced (see Pet. App. 17a).

[14] In his treatise, Professor LaFave notes that a luggage detention would be tantamount to a detention of the person,

Ninth Circuit's contrary conclusion is clearly correct:

> *Terry* and *Dunaway* and their progeny relate to detention of persons and not inanimate objects. The rationale relied upon by the Court in those cases is inappropriate as applied to "things," a seizure of which constitutes a *substantially less serious intrusion upon rights of the individual.*
>
> * * * * *
>
> We look then to the standard of reasonableness as required by the fourth amendment in the seizure and detention of inanimate objects.

United States v. *Martell*, 654 F.2d 1356, 1359 (9th Cir. 1981) (emphasis added), petition for cert. pending, No. 81-1772.

Under the reasonableness standard of the Fourth Amendment, it is recognized that even seizures of the person may be somewhat prolonged on the basis of reasonable suspicion. See *Michigan* v. *Summers*, *supra*, 452 U.S. at 700. At some point, however, further prolongation of the intrusion caused

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and hence be subject to the same Fourth Amendment constraints, *if* the police do not dispel the belief that the "person must either remain on the scene [with his luggage] or else seemingly surrender his effects permanently to the police." 3 W. LaFave, *supra*, § 9.6, at 61 (1982 pocket part). In the absence of this consideration, however, Professor LaFave recognizes that a person's possessory interest in a container may be interfered with for some period of time on the basis of reasonable suspicion. *Ibid.* The court of appeals attempts to characterize this case as one where respondent feared that his luggage would be taken away, if not permanently, at least for a period of indefinite duration that could have lasted for "weeks" (Pet. App. 19a). But this assertion is belied by the record. The agents clearly informed respondent that his luggage would be returned to him if a magistrate refused to issue a search warrant, and they gave him a 24-hour number that respondent could call to arrange for the return of his luggage. See J.A. 6, 8, 9.

by the seizure becomes unreasonable in the absence of probable cause. See, *e.g.*, *Dunaway* v. *New York*, *supra*. Because the temporary seizure of luggage is so much less intrusive than that of a person, the point at which prolongation of the seizure becomes unreasonable in the absence of probable cause is considerably more distant. This is not to deny that at some point a detention of luggage would become sufficiently intrusive to require probable cause (see *United States* v. *Van Leeuwen*, *supra*, 397 U.S. at 252; *United States* v. *Regan*, No. 81-1722 (1st Cir. Sept. 1, 1982) (22-hour luggage detention required probable cause)), but ordinarily luggage may be detained on the basis of reasonable suspicion for longer than a person could be detained under similar circumstances.

C. The Government Interest In Temporarily Detaining Respondent's Luggage While Pursuing A Specific Course Of Investigation Warranted The Limited Intrusion Involved

In our view, the court of appeals failed to strike a proper balance here between the interests of society implicated when law enforcement officials reasonably suspect luggage of containing contraband and the interests of suspected drug couriers who are temporarily inconvenienced by detention of their luggage to arrange exposure to a drug detecting dog. Certainly there can be little doubt that the government has a vital interest in alleviating the serious drug abuse problem in this country. As the Second Circuit has noted, the societal costs of the enormous narcotics trade, "in terms of ruined and wasted lives, are staggering." *United States* v. *Oates*, 560 F.2d 45, 59 (1977). See generally W. Seymour, *The Young Die Quietly: The Narcotics Problem in America* (1972). Thus, "[t]he public has a compelling inter-

est in detecting those who would traffic in deadly drugs for personal profit." *United States* v. *Mendenhall, supra*, 446 U.S. at 561 (opinion of Powell, J.).

As part of its effort to stem the distribution of narcotics throughout the United States, the Drug Enforcement Administration (DEA) operates an airport surveillance program designed to detect and intercept couriers transporting narcotics between major drug source and distribution centers. See *United States* v. *Mendenhall, supra*, 446 U.S. at 562 (opinion of Powell, J.). Under this program, trained agents observe arriving and departing passengers on certain flights, looking for characteristics and behavioral traits that tend to distinguish drug couriers from ordinary passengers. When these observations give rise to a suspicion that a particular passenger is transporting narcotics, the agents follow a fairly standard investigative procedure in approaching and briefly questioning the suspect, including asking to see his identification and, if developments appear to justify it, asking for consent to a search.[15]

In some instances, the suspect's responses to the agents' questions or a brief consented-to search will dispel these suspicions, and there will be no reason to detain the suspect or his luggage. In other in-

[15] If the agents have some suspicion, but less than "reasonable suspicion," that an individual is carrying narcotics, they may approach him and ask him some questions, but the suspect is free to refuse to answer the questions and to walk away. See generally *United States* v. *Mendenhall, supra*; Brief for the United States as Amicus Curiae at 20-25 & nn.21, 24 in *Florida* v. *Royer*, No. 80-2146, 1981 Term. In this case, the district court found (Pet. App. 47a-52a) and the court of appeals assumed (*id.* at 14a) that the agents had a reasonable suspicion that respondent was engaged in criminal activity when they approached him in LaGuardia Airport.

stances, this brief investigation may disclose facts that ripen the agents' reasonable suspicion into probable cause, in which case the agents are empowered to arrest the suspect and seize his luggage pending application for a search warrant. In a third category of cases, however, the brief questioning of the suspect will neither allay the suspicion nor give the agents probable cause, yet further prolongation of the personal detention would be unreasonable. See, *e.g.*, *Dunaway* v. *New York*, *supra*. But to allow the suspect to proceed on his way with luggage reasonably believed to contain contraband would be imprudent, because the narcotics would almost certainly disappear quickly into the stream of distribution.[16] Therefore, where feasible in such cases, the agents allow the suspect to leave but temporarily detain his luggage so that a drug detecting dog can resolve whether the luggage in fact contains drugs before it is released from the agents' custody.

The luggage detention involved in these situations is not open-ended; rather, it is an action taken to preserve the status quo while the officers pursue a specific course of investigation of limited duration that will confirm or dispel the agents' reasonable suspicion that criminal activity is afoot. It is precisely this kind of specific investigation that has been recognized by this Court as justifying a detention of some duration on the basis of reasonable suspicion. For example, in *Van Leeuwen*, the justification for

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[16] Once the drug courier has become aware that he is under suspicion, it is virtually certain that he would "take immediate steps to dispose of any contraband located in the suitcase." *United States* v. *West*, 651 F.2d 71, 74 (1st Cir. 1981), petition for cert. pending, No. 81-307. See also Pet. App. 25a (Kaufman, J., dissenting).

the detention was to contact postal officials in Nashville, Tennessee, to obtain information about the addressee of one of the suspicious packages. See 397 U.S. at 250. See also *Michigan* v. *Summers*, *supra*, 452 U.S. at 700-701 n.12.

The prolongation—to a lesser extent—of an investigative detention of a person may also be justified by the need to preserve the status quo while completing a specific line of investigation. The courts of appeals have recognized the propriety of extending a detention in order to obtain information from another law enforcement agency (*United States* v. *Contreras-Diaz*, 575 F.2d 740, 745 (9th Cir.), cert. denied, 439 U.S. 855 (1978); *United States* v. *Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975)) or to permit an officer with special expertise to arrive at the scene (*United States* v. *Moore*, 638 F.2d 1171, 1174 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981); *United States* v. *O'Looney*, 544 F.2d 385, 389 (9th Cir.), cert. denied, 429 U.S. 1023 (1976)). And, analogous to the situation here, it is permissible for police to detain a suspect on the basis of reasonable suspicion for the purpose of transporting him back to the scene of the crime for possible identification by the victim. *United States* v. *Short*, 570 F.2d 1051, 1054-1055 (D.C. Cir. 1978); *United States* v. *Wylie*, 569 F.2d 62, 70-71 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978). See also *United States* v. *Mayes*, 524 F.2d 803, 805 (9th Cir. 1975) (suspect detained while officers backtracked in order to verify or disprove his exculpatory explanation of his activities).

In this case, the government interest in maintaining the status quo in order to complete the specific course of investigation was particularly strong be-

cause the investigation was almost certain to confirm or dispel the agents' suspicions. A sniff test by a properly trained dog is "extremely reliable" and hence, as soon as the agents could arrange for the test, they could expect to have, depending on the dog's reaction, either probable cause or no reason to detain the suitcase further. See, *e.g.*, *United States* v. *Waltzer*, No. 82-1015 (2d Cir. June 25, 1982), slip op. 3556-3557; *United States* v. *Beale*, 674 F.2d 1327, 1334 (9th Cir. 1982); *United States* v. *Venema*, 563 F.2d 1003, 1007 (10th Cir. 1977); 1 W. LaFave, *Search and Seizure* § 2.2, at 288 (1978).

Weighed against this government interest, the intrusion involved in the detention here was small. Respondent was clearly informed that he was free to leave and that his luggage would be returned to him if a search warrant was not procured. After respondent left, the agents immediately took the luggage over to the nearest available dog, at the Customs Bureau facility at Kennedy Airport.[17] Even in rush-hour traffic, it was at most 90 minutes until the sniff test was performed and the agents thereby obtained probable cause to believe the luggage contained contraband (see J.A. 11-12). The disposses-

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[17] The court of appeals suggested (Pet. App. 21a) that the transportation of the luggage to Kennedy, rather than bringing the dog to the luggage, made the intrusion here greater than necessary. But as Judge Kaufman pointed out in dissent (Pet. App. 26a), this fact is completely irrelevant. The intrusion into respondent's Fourth Amendment rights was the dispossession of the luggage. It was of no consequence to him whether the luggage was situated at Kennedy or LaGuardia Airport while it was temporarily in police custody. In addition, it would have been unreasonable in the particular circumstances to bring the dog to LaGuardia. See pages 31-32, *infra*.

sion of his luggage for this length of time, during which no privacy interest was invaded,[18] was not a substantial intrusion into respondent's protected Fourth Amendment interests; indeed, the 90-minute detention is not significantly longer than some detentions of persons that have been recognized as reasonable. See *United States* v. *Richards*, *supra* (one hour); see also *United States* v. *Contreras-Diaz*, *supra* (90-minute detention not necessarily unreasonable).

Moreover, the detention here was not extended any longer than necessary. The court of appeals suggested that the detention was unreasonable because the agents should have had a trained dog available at LaGuardia Airport to sniff respondent's luggage immediately upon his arrival, thus eliminating the need for detaining it (see Pet. App. 19a-20a). But this observation is based on hindsight and totally ignores the practicalities of the situation. First, the LaGuardia agents did not know that they would need a dog to search respondent's luggage. They did not even approach him immediately after he deplaned,

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[18] The detention itself, of course, while affecting a property interest, invaded no privacy interest. And because a canine sniff test produces no information about the contents of luggage other than whether it contains narcotics, it similarly did not implicate respondent's privacy interest in the contents of his luggage. See, *e.g.*, *United States* v. *Waltzer*, *supra*, slip op. 3557-3558; *United States* v. *Goldstein*, 635 F.2d 356, 360-361 (5th Cir.), cert. denied, 452 U.S. 962 (1981); 1 W. LaFave, *supra*, § 2.2, at 287-288; Note, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime*, 44 Fordham L. Rev. 973, 987 (1976); cf. *United States* v. *Beale*, *supra* (recognizing that dog sniff establishes only whether or not narcotics are present but holding that reasonable suspicion required).

but instead waited until they had observed him for some period (see Pet. App. 38a-39a). Even if the agents had definitely decided in advance, on the basis of the information supplied by the Florida officers, to stop respondent for questioning, the investigation of suspected drug couriers is often completed without the need to summon a drug detecting dog. See pages 27-28, *supra*.[19]

More important, the paucity of trained drug detecting dogs makes it impossible as a practical matter to have a dog waiting whenever a suspected drug courier is arriving at an airport. The DEA itself has no drug detecting dog program. When the need arises for such a dog, the DEA seeks to borrow one from another law enforcement agency, generally the Customs Bureau or a state or local police department. Customs Bureau teams, consisting of a trained dog and its handler, are located at 28 international ports-of-entry but not at domestic terminals; hence, there is no team stationed at LaGuardia Airport. Because these teams are needed to perform their primary duties at the ports-of-entry, they are not ordinarily dispatched from their stations in order to lend assistance to the DEA, and certainly it would not have been appropriate here to take the Kennedy Airport dog team away from its other duties and send it over to LaGuardia Airport simply to await the arrival of respondent's plane. Thus, in many cases, particularly where the suspect arrives at an airport that does

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[19] In this case, because respondent had already consented to a search of his luggage in Miami, which the officers there decided not to perform because respondent's plane was leaving shortly (see Pet. App. 3a, 37a; Tr. 21-22), the DEA agents in New York had no reason to believe that they would require the services of a drug detecting dog.

not handle international flights, some period of delay in arranging a dog sniff is inevitable.

Theoretically, of course, the DEA could train its own dogs and station a dog and a handler in every airport where an airport surveillance program to detect drug couriers is in effect. In light of the very small numbers of travelers who are stopped by DEA agents in the course of this surveillance program,[20] however, and the fact that a dog is often unnecessary in the investigations that are commenced, the cost of training a dog and stationing a dog and handler at each airport would be totally out of proportion to the amount of use they would receive. Cf. *Cady* v. *Dombrowski*, *supra*, 413 U.S. at 447 (warrantless search reasonable although it would have been unnecessary if police guard posted); *Chambers* v. *Maroney*, 399 U.S. 42, 51-52 (1970) (warrantless automobile search reasonable although there is no exigency). Thus, as a practical matter, the limited intrusion of a 90-minute detention of respondent's luggage was unavoidable here if the government's strong interest in pursuing a more complete investigation was to be served.

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[20] While comprehensive statistics reflecting the percentage of travelers approached by DEA agents in the course of the airport surveillance program are unavailable at this time, evidence adduced in some reported cases suggests the infrequency of these approaches. In *United States* v. *Garcia*, 450 F. Supp. 1020, 1022 (E.D.N.Y. 1978), a case also arising out of LaGuardia Airport and involving Agent Whitmore, the defendant was the only individual approached in an entire day of surveillance. Statistics kept during the first 18 months of the program at Detroit Airport showed only 96 encounters that resulted in searches. See *United States* v. *Mendenhall*, *supra*, 446 U.S. at 562 (opinion of Powell, J.), citing *United States* v. *Van Lewis*, 409 F. Supp. 535, 539 (E.D. Mich. 1976), aff'd, 556 F.2d 385 (6th Cir. 1977).

Apart from the court below, the courts of appeals have uniformly concluded in the context of the DEA program that a temporary detention of luggage to arrange exposure to a drug detecting dog is "reasonable" under the Fourth Amendment because the strong government interest involved outweighs the limited interference with the individual's liberty. The seminal case is *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980), where the court found the principles enunciated in *Van Leeuwen* applicable in this context. Given the agents' reasonable suspicion that the luggage contained contraband, the court concluded, the agents "would have been remiss in not detaining the bags for further investigation." 626 F.2d at 26. See also *United States* v. *Benjamin*, 637 F.2d 1297 (7th Cir. 1981).

Four other courts of appeals have followed *Klein*. The Ninth Circuit in *United States* v. *Martell*, *supra*, 654 F.2d at 1359, particularly emphasized the lesser intrusion involved in a detention of luggage as compared to detention of a person; the court specifically held that the duration of the detention involved there was unreasonable in the case of a person but upheld the luggage detention. See also *United States* v. *Anderson*, 663 F.2d 934, 938 n.2 (9th Cir. 1981). The First Circuit recognized that the luggage detention "inconvenienced" the defendant, but held that such a limited interference with his privacy interests was not sufficient to render the detention unreasonable. *United States* v. *Viegas*, 639 F.2d 42, 45 (1st Cir.), cert. denied, 451 U.S. 970 (1981). See also *United States* v. *West*, 651 F.2d 71 (1st Cir. 1981); but see *United States* v. *Regan*, *supra* (22-hour detention excessive). Since the decision of the court below, the Fourth and Tenth Circuits have also noted their

approval of *Klein*. *United States* v. *Corbitt*, 675 F.2d 626, 629 (4th Cir. 1982); *United States* v. *MacDonald*, 670 F.2d 910, 914 (10th Cir. 1982).[21]

The court of appeals' contrary conclusion flies in the face of the Fourth Amendment's reasonableness standard. The agents here were faced with a situation in which they reasonably suspected that respondent's luggage contained narcotics and knew that they could determine the accuracy of their suspicions within a couple of hours by subjecting the luggage to a dog sniff test. They acted reasonably in allowing respondent to go on his way, but retaining the luggage long enough to have the test performed. Surely, the

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[21] The court below asserted (Pet. App. 21a) that the contrary court of appeals decisions extant at that time were distinguishable from the instant case. The court noted that the agents here did not fully disclose to respondent their intentions with respect to the luggage. This allegation, of course, is irrelevant to the issue presented here, since it is undisputed that the detention was against respondent's wishes. In any event, the statement made by the agents here that they were detaining the luggage pending application for a search warrant appears almost identical to the statement made by the agent in *Klein*. See 626 F.2d at 25.

The majority below also asserted that the detention involved here was longer than that involved in the other cases. In fact, the record in both *Klein* and *Viegas* indicates that the detentions in those cases were significantly longer. See Comment, *Seizing Luggage on Less than Probable Cause*, 18 Am. Crim. L. Rev. 637, 638 (1981), citing suppression hearing transcript in *Klein* (detention in *Klein* approximately 2½ hours); 80-1344 Br. in Opp. 3, citing suppression hearing transcript in *Viegas* (agents in *Viegas* informed that dog would not be available for four hours). The luggage was detained in *West* for about an hour before the dog arrived (see *United States* v. *West*, 495 F. Supp. 871, 873 (D. Mass. 1980)) and in *Martell* for about 20 minutes (654 F.2d at 1358 (dog had been summoned 30 minutes before luggage was detained)).

"substantial law enforcement interest[]" implicated in the attempt to intercept this shipment of illicit drugs justified the "limited intrusion[]" involved in dispossessing respondent of his luggage for this relatively brief time period. *Michigan* v. *Summers*, *supra*, 452 U.S. at 699. "Detention for this limited time was, indeed, the prudent act," rather than letting the suspected narcotics out of the agents' custody and into the stream of distribution, and it "cannot be said to be 'unreasonable' within the meaning of the Fourth Amendment." *United States* v. *Van Leeuwen*, *supra*, 397 U.S. at 253.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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